

TO: Mr. David Fried, Deputy Town Attorney
Mr. Paul Feiner, Greenburgh Town Supervisor

CC: Greenburgh Town Council
Greenburgh Town Clerk

OPINION 2013 -1

Background

This Advisory Opinion addresses 1) Deputy Town Attorney Fried's December 2012 request for an opinion regarding the offer by a local restaurant to provide an individual gift certificate for a free dinner at its establishment to each Town employee and whether the gift certificates could be distributed to employees in their pay envelope or by a department head at the time paychecks are distributed and 2) a subsequent request for opinion from Town Supervisor Feiner's concerning the action to be taken following the erroneous distribution with the paychecks of a promotional offer from the restaurant.

Hurricane Grill and Wings, the subject of this inquiry, is not known to be an applicant before the Town, be in litigation with the Town or have a contract with the Town. A Certificate of Occupancy (CO) for the restaurant was granted by the Building Department of the Town of Greenburgh in November 2010. On January 25, 2013, The Board of Ethics was advised by an email from Town Supervisor Feiner that through administrative error a promotional offer from the restaurant had been included in the paycheck distribution on January 24, 2013. Although the inclusion of the promotional offer in the paycheck distribution offer has rendered moot the original request by Mr. Fried concerning a gift certificate, the Board of Ethics considers it important to address the issues raised in Mr. Fried's request along with those which arise from the subsequent event described by Mr. Feiner.

In his email of January 25, Mr. Feiner inquired as to whether he should contact the restaurant and ask it not to honor the offer which was included with the Town employee paychecks. The Chair of Board of Ethics advised Mr. Feiner not to contact the restaurant until the Board of Ethics had the opportunity to gather relevant facts and consider the matter at its meeting scheduled for January 28, 2013. On January 28, after review of the actual offer which had been included with the paychecks and an accompanying appreciative cover letter to employees from Supervisor Feiner, the Board of Ethics advised Mr. Feiner that the Town should not contact the restaurant, should not ask the restaurant not to honor the promotion which had already been sent to employees and that the Town should take no action which would lead to the extension of the validity date of the offer beyond January 31, 2013. The document which was enclosed with the paychecks was not a gift certificate but a promotional offer for Town employees redeemable during the month of January upon presentation of a Town employee identification card. The offer was for a free meal up to a value of \$15 per employee as long as a second person purchased a meal of equivalent or greater cost. In effect, the offer was for a discount of up to 50% and not a straight gift as was described in Mr. Fried's request. One or more similar promotions have been made by the restaurant to the general public on, for example, Groupon.

Opinion

1) The restaurant may grant and employees may accept the promotional offer distributed in the paychecks. If the offer had been in the form of a gift certificate, as originally understood, employees would also have been able to accept it provided that it were useable only by the employee who originally received it and could not be redeemed by the employee for cash.

2) Because it would constitute receipt of a gift on Town property in violation of Section 570-4 A(2), gift certificates may not be included in employee pay envelopes nor be distributed to employees by department heads, supervisors or other Town employees at the time paychecks are given out or at any other time. It would be the responsibility of the restaurant to make gift certificates available to employees provided distribution did not take place on Town property. The Board of Ethics makes a distinction between gift certificates and promotional offers. Distribution of promotional offers such as the one that was erroneously included with the paychecks does not constitute a receipt of a gift on Town Property. However, their inclusion with the paychecks does raise the issue of whether and under what circumstances Town assets and services can be used to distribute to Town employees promotional offers by private entities such as restaurants.

3) In the given circumstance that the Town erroneously sent out the promotional announcement, the Town was not required to contact the restaurant and tell the restaurant not to honor the promotion. It should be noted that the offer, which is valid only in the month of January, was sent to employees one week prior to the end of the month and that on January 28, 2013 just three days now remain in the month.

Section 570-4 A(2)) proscribes acceptance of a gift under circumstances where it "could reasonably be inferred that the [gift] . . . was intended to influence her/him in the performance of her/his official duties . . . or was intended as a reward for any official action on her/his part." In our opinion the offer of a gift certificate described in Mr. Fried's request does not contravene this section of the Code of Ethics. This is based on an assessment of the circumstances of this case including: 1) that the offer would be made to all employees of the Town; 2) that there is no official action now pending before the Town; 3) that the Certificate of Occupancy was granted more than one year ago; and 4) that the retail value of the gift to any individual employee is not significant. Although the initial request did not specify a dollar amount for a meal, examination of the Restaurant's menu contains indicative price ranges.

Section 570-4 A (1) (a) of the Town Code of Ethics states in relevant part that "except as provided in Section [570-4 A\(3\)](#), no Public Officer or Employee shall directly or indirectly accept any gift from any person or Legal Entity on Town property, other than for and on behalf of the Town". The gift certificates that are the subject of this opinion would be for the benefit of individual Town employees, not gifts on behalf of the Town. It is the Opinion of the Board of Ethics that the inclusion of the gift certificate in the pay envelopes of employees or their receipt from supervisors would constitute receipt of the gift on Town property. The exception provided for in Section [570-4 A \(3\)](#) relates to special occasions such as weddings, birth of a child, birthdays, and retirements. In the Opinion of the Board of Ethics the exception is not applicable to this case.

§ 570-6. Use of Town-owned equipment or property. "No Public Officer, Employee or Agency Member shall request, obtain, permit the use of or use Town-owned vehicles, equipment, buildings, material, or property or Town-funded services for personal convenience, Interest, use or benefit or the personal convenience, use or benefit of others, except when such services are available to the public generally or are specifically provided by the Town Board for the use of such Public Officer, Employee or Agency Member in the conduct of official business". In the opinion of the Board of Ethics, to qualify as official business, the use of town-owned assets or town-funded services to distribute promotional offers for private entities must be based on a general authorization by the Town Board and governed by fair and consistent standards. The Town Board may examine as a matter of policy whether it wants to consider the distribution of promotional offers as official business and, if so, establish the circumstances under which it would do so and also to establish fair and consistent standards. The absence of such standards could lead to the perception of unequal treatment by businesses. Unless and until The Town Board has authorized the use of Town assets and services for such a purpose and established relevant standards, the Town should not distribute promotional offers.

No opinion is expressed herein as to what conclusions would be reached if any of the facts upon which this advisory opinion is based were to change.

Concluding Matters

The Board of Ethics accepts Supervisor Feiner's statement that the distribution of the promotional offer with the paychecks was accidental. Supervisor Feiner has stated that this type of error will not happen again. The fact that two different Town Departments were dealing with the same restaurant on the same issue at the same time may have contributed to the error. Examination by the Town of its procedures and communications may help prevent such an error.

BY THE BOARD OF ETHICS

Adopted at January 28, 2013 Meeting

Voting for:

Mr. Constantine
Mr. Eisen (consent by proxy)
Dr. Hopkins, PhD
Mr. McLaughlin
Mr. Scott